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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

163

ANTHONY ORLANDO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To The

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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TEXT.

Illinois Bar Journal, January 1964, Vol. 52 No. 5 p. 443 14-15

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To The

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Anthony Orlando, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Sixth Circuit, hereinafter set forth.

JUDGMENT AND OPINION OF THE COURT BELOW.

On January 30, 1964, the United States Court of Appeals for the Sixth Circuit affirmed a judgment of the United States District Court for the Eastern District of Kentucky, denying petitioner's motion to vacate an earlier criminal judgment against him, which motion

was filed pursuant to Section 2255, Title 28, United States Code. The opinion of the Court of Appeals is reported at 327 F. 2d 185, and is reprinted as Appendix "A" to this Petition.

JURISDICTIONAL STATEMENT.

Petitioner filed a motion in the United States District Court for the Eastern District of Kentucky, seeking to vacate a judgment heretofore entered against him in a criminal case in that court. The motion was filed in pursuance of Section 2255, Title 28, United States Code. The motion was denied by the District Court.

On appeal to the United States Court of Appeals for the Sixth Circuit, the judgment was affirmed by an opinion filed January 30, 1964.

A petition for rehearing was timely filed, and was denied on March 3, 1964.

On June 1, 1964, Mr. Justice STEWART entered an order extending the time for filing this petition, to and including June 8, 1964.

The jurisdiction of this court is invoked under the provisions of Section 1254 (1) and Section 2101 (c), Title 28, United States Code.

QUESTIONS PRESENTED FOR REVIEW.

1. Do the standards set forth in *Townsend* v. *Sain*, 372 U.S. 293, governing the right to an evidentiary hearing for a petitioner in a federal habeas corpus proceeding challenging the validity of a state criminal conviction, also apply to a petitioner who attacks the validity of a federal criminal judgment under Title 28 U.S. Code, Section 2255?

2. May a District Court properly refuse to entertain a petition filed under Title 28 U.S. Code, Section 2255, if that petition sets forth grounds which would clearly entitle the petitioner to a hearing if the contested judgment had been entered in a State court?

3. Where, by motion under Title 28 U.S. Code, Section 2255, a federal prisoner makes representations which constitute a prima facie showing that the sentence imposed upon him constitutes the denial to him of due process of law, and

Where said prisoner's allegations relate to matters dehors the files and records of the case in which sentence was imposed, then,

May a District Court summarily deny said motion without hearing evidence?

4. Where a motion under Title 28 U.S. Code § 2255 recites that the allegations thereof will be supported by the testimony of two named lawyers practicing before the court in which the petition is filed, one of whom was the prosecutor at the time of movant's conviction,

May a District Court summarily deny such a motion without calling for any expression from the lawyers thus named?

5. Where a federal prisoner files a motion under Title 28 U.S. Code § 2255 seeking to set aside the judgment of conviction against him on the grounds that said judgment is the product of the denial to him of due process of law, and his motion is summarily denied without hearing, and said movant thereupon files a second and more detailed motion, then,

May the District Court refuse to entertain the second motion, solely upon the grounds that it is a "second or successive motion" within the meaning of 28 U.S.C. 2255; or,

Is a "second or successive motion" under 28 U.S.C. Section 2255 barred only where a prisoner has had some form of hearing on his original motion?

STATUTE INVOLVED.

Title 28 United States Code, Section 2255, is as follows:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside, or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall dis-

charge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

STATEMENT OF THE CASE.

(The notation A-a and A-b refer to Petitioner's and Government's respective appendicies in the court below; the notation R— refers to the record from that court; the notation "Appendix" refers to this petition.)

In November of 1958, petitioner was charged with the crimes of bank robbery and conspiracy to commit bank robbery. On March 13, 1959, petitioner pleaded guilty, and received a sentence of 25 years on the bank robbery charge. A five year sentence was imposed on the conspiracy charge, to run concurrently with the robbery sentence. (A. 10a). On October 15, 1962, the petitioner

filed in the sentencing court his motion, *pro se*, seeking to vacate the judgment of conviction or to reduce his sentence to a term of not more than 15 years (A. Supp. 1A). This motion alleged that his plea of guilty had been induced by the United States Attorney's promise that he would not receive a sentence in excess of fifteen years if he would so plead, and that otherwise he would receive a sentence of 30 years. The motion also complained of the denial to petitioner of a transcript of the record in his case, the alleged failure of the court to permit petitioner "to say anything personally either before or after sentence was imposed," the denial of a continuance, and the alleged prejudice resulting to petitioner from "the write-ups in the papers." (A. Supp. 2A-3A).

A week later, the District Court entered an order stating that a review of the record, including a transcript of the arraignment and sentence, had shown the defendant's motion to be entirely without merit. The motion was thereupon denied (A 5A).

On December 14, 1962, the petitioner "tendered" a second petition, which was filed December 21, 1962. (A. 7A). Within this motion, the petitioner averred that prior to trial, his lawyer had advised him that he had made "a deal or agreement" with the United States Attorney, whereby it had been arranged that if petitioner would plead guilty, his sentence would not exceed 15 years. Petitioner further stated in his motion that he had agreed to plead guilty on the condition that his sentence not exceed 15 years, and that he had a valid defense which he was "forced to forsake." He further stated that his decision "to take the best deal I could get" was also motivated "by the implied promise" of the United States Attorney that if petitioner forced the

government to trial, "that every effort would be made and all influence exerted to obtain a maximum penalty." (A. 11A-13A).

Within that motion, petitioner named four persons who, he alleged, would testify in support of his allegations. Two of these were co-defendants of petitioner.[1] The other two witnesses thus named were the United States Attorney at the time of petitioner's conviction, and the lawyer who had then represented him (A. 11a). Petitioner's second motion was denied ten days after its filing; and without hearing or other proceedings (A. 17A). The District Court further filed a memorandum, stating that the denial of that motion was grounded upon the fact that an earlier motion had been presented, setting forth substantially the same facts, and that the District Court was thereby relieved of the necessity of considering a second motion. (A15a-16a).

Petitioner appealed this denial to the United States Court of Appeals for the Sixth Circuit. That court affirmed the denial. *United States* v. *Orlando*, 327 F.2d 185, Appendix A. The opinion noted that at the time of sentencing, petitioner had admitted his guilt, and that prior to sentencing, petitioner had been asked whether he had anything further to say following his lawyer's plea in mitigation, and replied in the negative. The Court of Appeals commented on the lack of detail in Petitioner's motion, and his failure to disclose the identity of two of the six witnesses to whom he referred. The opinion also stated that the two attorneys named by petitioner could not "on the record before us be considered by the Court as witnesses favorable to the appellant." Charac-

[1] The defendants were incarcerated in three separate institutions. (A.11a, 15a).

terizing his allegations as "vague, conclusory, or palpably incredible", the Court of Appeals affirmed the judgment.

Petitioner's lawyer died suddenly in the course of oral argument of the case in the Court of Appeals. (R. 2) On the rendition of the opinion above referred to, Petitioner filed *pro se* a petition for rehearing in the Court of Appeals. This petition averred factually that the two unnamed witnesses were relatives of the co-defendant Brinegar, whose actual names were unknown to Petitioner, but who had been present in the prosecutor's office and had heard the promise made. The petition was verified "under penalty of perjury." (R. 7-8) On March 3, 1964, the Court of Appeals entered an order denying the Petition. (R. 12)

BASIS OF FEDERAL JURISDICTION.

Petitioner, being confined in the custody of the Attorney General of the United States pursuant to a judgment of conviction entered by a United States District Court, commenced the proceedings below in said District Court by motion under Title 28 U.S. Code, § 2255.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioner has duly alleged that his plea of guilty was induced by a promise of leniency, and that in reliance upon that promise, he elected to plead guilty although he had "a valid defense" to the charge against him. (A. 12a, 13a) Even if the sufficiency of the "valid defense" be questioned, there can be no question that Petitioner had a legal and a moral right to plead not guilty and to force the government to prove its case beyond a reasonable doubt. This right, perhaps the bedrock of all civil rights, was certainly waived by petitioner. He alleges,

without direct contradiction, that he surrendered this right in exchange for a promise that his sentence would not exceed fifteen years.

Petitioner's allegations have been disregarded in a summary manner, notwithstanding that the record contains neither a refutation nor a competent denial of his allegations.

At the time petitioner was sentenced, the United States Attorney in the sentencing district was Mr. Henry Cook (A. 11a, 1b). When petitioner's motion under Section 2255 was filed in the sentencing court, Mr. Bernard T. Moynahan, Jr. had succeeded to that office (A. 3a). Mr. Moynahan had not participated in the original proceedings (A. 1b).

Petitioner's first motion alleged, *inter alia*, that he had been "induced" to plead guilty by the prosecutor's promise that he would not receive a sentence in excess of 15 years, which promise was relayed through his court-appointed counsel. (A. Supplement 2a). This allegation was generally denied in a "response" filed by the government and signed by an Assistant United States Attorney (A. 3a, 4a) who had also not participated in the original proceedings (A. 1b). The government's response also stated that petitioner's motion "is composed only of vague, indefinite general charges." (A. 4a). The motion was denied on the basis of the record and without hearing (A. 5a, 2a).

About six weeks later, petitioner, still acting pro se, filed his second motion (A. 7a). His allegations this time were detailed (A. 8a-13a). He stated that his contentions would be supported by six witnesses, including two co-defendants, his court-appointed attorney, *and the prosecutor at the time of his sentencing* (A. 11a). He also

stated that he would "furnish two additional witnesses that are not named above", in addition to his own testimony (A. 11a). The record shows no response to the second motion. It was denied ten days after it was filed (A. 17a), on the grounds that Section 2255 did not require that a second motion be entertained (A. 16a).

Petitioner engaged counsel and appealed. The Court of Appeals affirmed "for the reason given by the District Judge". (Appendix A, page 5a). The court commented that petitioner had not presented affidavits from his witnesses, setting out what they would testify if called (A. 1, page 4a). The opinion further commented that the defendant had relied "in part upon two witnesses whose names he does not even disclose." (A. 7a).

Petitioner's counsel had died during the pendency of the appeal (R. 2). On the rendition of the opinion, Petitioner, again proceeding pro se, filed his petition for rehearing, stating that the names of the two unnamed witnesses were unknown to him, but that they were a sister and brother-in-law of one of his co-defendants, who had heard Mr. Cook make the alleged promise (R. 7). He further stated that his three and one-half year delay in presenting his petition had been due to the fact that he had been unaware what legal steps to take (R. 8).

The government filed a response to the petition for rehearing (R. 10-11) stating that the "circumstances indicate" that the petition was false because it was very unlikely that the petitioner would have been brought to the United States Attorney's office. It may be noted that this response wrongly quotes the Petitioner as contending that Mr. Cook's promise was made in Petitioner's presence (R. 10). The petition for rehearing was denied (R. 12) and by this petition for writ of certiorari petitioner seeks this court's review.

An extended citation of authorities in support of the Petitioner's position is frankly deemed unnecessary in view of this court's holding in *Sanders* v. *United States*, 1963, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed. 2d 148. The *Sanders* opinion might well serve as Petitioner's brief here. It is so completely irreconcilable with the opinion here presented for review, that it may fairly be termed remarkable that both opinions are products of the same system of jurisprudence.

In fact, such factual differences as exist to distinguish *Sanders* from the case at bar, all run in Petitioner's favor. Sanders, in his second motion, set forth matters which might well be said to have been known to him at the time of the filing of his first motion, but not contained therein. Contrast Petitioner's situation. In all his motions and petitions, he has consistently contended that his plea had been motivated by a promise of a fifteen year sentence.

This Court's recognition, as expressed in *Sanders*, that an inartistic pro se petition filed by a prisoner is likely to require revision and amendment before reaching its final actionable form, has not been extended to petitioner by the courts below. Petitioner's first motion was rejected after the government had termed it a composite "only of vague, indefinite general charges." (A. 4a). Petitioner with reasonable promptness filed a second motion not susceptible of that criticism, but the second motion was denied because it was a second motion. His appeal was rejected on the same grounds, but with certain further observations worthy of notice.

The Court of Appeals pointed out that Petitioner had not named two of his witnesses (Appendix A, 7a). The Petitioner promptly replied that he did not know their names, but furnished a description and relationship of

sufficient definiteness as to make it completely certain that the identity of the witnesses could be determined readily and beyond any question (R. 7).

The opinion disparaged Petitioner's co-defendants as witnesses, stating that their "credibility is such as to give little, if any weight to what they might say." (Appendix A. 7a) This, we suppose, may loosely be said of any federal prisoner, but it seems a very unsound basis for rejecting in advance any statements with which such a person might make. We strongly doubt that the law is prepared to assume that the credibility of any federal prisoner is necessarily "slight", so that the writ of habeas corpus ad testificandum may as well be abolished.

Finally, the opinion states that the two lawyers named as witnesses by the Petitioner "obviously cannot on the record before us be considered by the court as witnesses favorable to [Petitioner]." (Appendix A. 7a). On the contrary—on the record before the Court of Appeals, the testimony of those lawyers *must* be considered favorable to Petitioner. The Court of Appeals complains that Petitioner did not append their affidavits. But Petitioner is a prisoner in a federal penitentiary, and it is very doubtful that he has any means of obtaining any such affidavit, or that he had any awareness of the necessity of his doing so, even if such necessity in fact exists. As your Honors said in *Sanders*, "An applicant for such relief ought not to be held to the niceties of lawyer's pleadings." 10 L.Ed. 2d 165.

If in fact the two lawyers named, including the prosecutor at the time of conviction, were prepared to refute the Petitioner's contentions, it would seem much more probable that the United States Attorney might have

obtained their affidavits. Both lawyers are presumably still practicing before the sentencing court. The case at bar demonstrates amply the wisdom of this Court's expression in *Sanders*, that "the imaginative handling of a prisoner's first motion would in general do much to anticipate and avoid the problem of a hearing on a *second or* successive motion." 10 L. Ed. 2d 165. The testimony of the lawyers in question was readily available to the government and to the sentencing court. Having failed to call for any expression from them, it seems astounding that the government can become the beneficiary of a presumption that those witnesses were unfavorable to the Petitioner.

It is worthy of more than passing notice that the Petitioner, as a federal prisoner, did not receive in the lower courts the consideration that would have been mandatory had he been a state prisoner. In *Townsend v. Sain*, 372 U.S. 293, 313, 9 L. Ed. 2d 770, 786, your Honors stated certain criteria, the presence of any one of which elements will entitle a state prisoner, petitioning for habeas corpus in the federal courts, to an evidentiary hearing as of right. One of those six criteria—newly discovered evidence—has no application here. But each and all of the other five are present in the case at bar.

If the Petitioner here had been a State prisoner, and had received within the courts of his State treatment similar to that accorded him in the District Court, Federal relief would have been granted him as a matter of course under the *Townsend* decision. For Petitioner can show, conclusively, that, in the language of *Townsend*:

1. "The merits of the factual dispute were not resolved in the [state] hearing"—in fact, there was not even an attempt to do so.

2. "The [state] factual determination is not fairly supported by the record as a whole"—there is neither a "record" in the usual sense, nor even a factual determination.

3. "The fact-finding procedure employed by the [state] court was not adequate to afford a full and fair hearing"—the procedure was simplified to the point of complete unconstraint; it was simply abandoned.

4. "The material facts were not adequately developed at the [state] court hearing," for the compelling reason that no hearing was held.

5. "The [state] trier of fact did not afford the [habeas] applicant a full and fair fact hearing"—or, indeed, any other kind of hearing.

It would be anomalous indeed to state that a claim of deprivation of constitutional right in a State court is entitled to more serious consideration than the same claim arising out of Federal proceedings. Yet, that is the net effect of a comparison of *Townsend* v. *Sain* with the opinion here presented for review.

The Petitioner presented in the District court a simple claim, readily determinable. The District court has told him, in effect, that it cannot be bothered with such a matter. The Court of Appeals has told him, in effect, that the District court is very busy, and besides, Petitioner is probably lying, as Federal prisoners (as opposed to State prisoners) are, in its view, presumed to do.

We grant that the District court has many demands upon its time. But this Court has

> ". . . treated such considerations as secondary in light of the goal it sought to achieve, i.e., insuring the right of all state prisoners to contest detention contrary to the Constitution and laws of the United States . . .

(T)his right to be heard must be preserved and safeguarded at all costs." Illinois Bar Journal, January 1964, Vol. 52 No. 5, p. 443.

And, *a fortiori*, the safeguard extends to Federal prisoners. This is the lesson of *Sanders*.

The scales of justice simply cannot balance a very few hours of the District court's time, against ten years of the Petitioner's life.

CONCLUSION.

There is no just reason for denying to Petitioner a hearing upon the merits of his claim.

If the Petitioner's claim is untruthful, it will not be burdensome to the District court to determine that fact. If his claim is truthful, a great injustice has been done.

In these circumstances, it is lamentable that Petitioner must seek the attention of this Court. But seek it he must; he is without any practical alternative.

We pray that your Honors will not withhold relief. Granting it will do much to assure that this Court need not again be called upon in such a matter, and that Federal prisoners will receive a reasonable hearing on their proper claims at an appropriate stage of proceedings.

Respectfully submitted,

MELVIN B. LEWIS,
Attorney for Petitioner

APPENDIX "A".

No. 15304

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY ORLANDO,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Kentucky.

Decided January 30, 1964.

Before: MILLER and PHILLIPS, Circuit Judges, and McALLISTER, Senior Circuit Judge.

MILLER, Circuit Judge. This is an appeal from a judgment of the District Court overruling appellant's motion to vacate judgment, filed pursuant to Section 2255, Title 28, United States Code.

Appellant Orlando and three codefendants, Jalove, Brinegar and Thornton, were charged in a two-count indictment with (1) conspiring to rob the Farmers Bank of Petersburg, Kentucky, the deposits of which were insured by the Federal Deposit Insurance Corporation, and (2) the substantive offense of robbing said bank, in violation of Sections 371 and 2113, Title 18, United States Code, respectively.

Appellant and Jalove were represented by the same counsel of their own choosing. The District Judge appointed other attorneys to separately represent Brinegar and Thornton, at their request. On January 19, 1959,

the defendants, with counsel present, entered pleas of not guilty to both counts of the indictment and the case was set for trial on March 11, 1959. On March 11, 1959, a jury was regularly impaneled, accepted and duly sworn. At that time counsel for appellant and Jalove stated to the Court that said defendants desired to withdraw their prior pleas of not guilty and substitute pleas of guilty. Upon inquiry directed to each of them by the Court, each defendant confirmed their counsel's statement and entered a plea of guilty to both counts of the indictment. The Court inquired of the two defendants if they were doing this under their free will, and specifically asked, "You are entering your plea of guilty to these charges because you are guilty of them, is that right?" The defendants answered, "Yes, sir." The trial proceeded against Brinegar and Thornton.

On March 12, 1959, appellant and Jalove filed motions to withdraw their pleas of guilty and enter pleas of not guilty.

On March 13, 1959, after the jury retired to consider the case against Brinegar and Thornton, the Court, with appellant and Jalove present, heard counsel on these motions. Counsel stated that the two defendants, after discussing the matter very carefully with him "felt that without any question they were guilty of the charge in Count 2," and that they were admitting that they were the ones who robbed the bank, but that they did not feel that they actually engaged in a conspiracy as such for the purpose of robbing the bank, in that they did not plan it out in advance. He stated that they preferred to stand on the plea of guilty to robbing the bank and enter a plea of not guilty to the conspiracy charge. In answer to questions directed to them by the Court, each defendant stated that he wanted to stand on his guilty plea to the charge of robbing the bank. This was followed by a discussion between the Court, the defendant Jalove, and the United States Attorney attempting to explain to the defendants what constituted a conspiracy;

following which both defendants stated that they were pleading guilty to both counts of the indictment. Their counsel then withdrew their motions to withdraw their pleas of guilty.

The jury returned a verdict of guilty against Brinegar and Thornton.

At the sentencing of the four defendants, the Court asked appellant and his attorney if they had anything to say before judgment was pronounced. Appellant's attorney reviewed to the Court appellant's background and record, which showed that he had three long sentences in Illinois prisons, two short sentences in the house of correction in Chicago, that he was a product of an environment problem and characterized as a "bad character," that by reason of inability to obtain employment he had fallen in with poor companions and had been led into a life of crime, that appellant was "beyond the point where we can hope that anything may correct him," that "After we studied it over very carefully, we decided the only thing for him to do would be to enter his plea of guilty to the charge and to throw himself upon the mercy of the court," and that the appellant had done the decent thing by pleading guilty and admitting freely and frankly to the Court what his situation was, of which the Court should take cognizance in dealing with the case. The appellant, in answer to the Court's inquiry, "Do you have anything further you want to say, Anthony?" replied, "No, sir."

The Court imposed a sentence of five years on the first count of the indictment and twenty-five years on the second count, the sentences to run concurrently.

On October 15, 1962, appellant filed a motion to vacate the twenty-five year sentence or to reduce it to not more than fifteen years on the ground that he was induced to plead guilty by his counsel, who informed him that if he would plead guilty the United States Attorney had guaranteed that he would not receive a sentence in ex-

cess of fifteen years, but unless he was willing to plead guilty he would receive a sentence of thirty years. He also relied on the following additional grounds which were either clearly refuted by the record or were without merit, namely, (1) he was not afforded an opportunity to say anything personally either before or after sentence was imposed, (2) he was denied a continuance for the purpose of employing other counsel, (3) that his motion for change of venue was improperly denied, and (4) that his motion for a transcript of the record was improperly denied.

The motion was denied by the District Judge on October 23, 1962, without a hearing, upon a consideration of the record, including a transcript of the arraignment and sentence, on the ground that the motion was "entirely without merit." No appeal was taken from this order, although such was available to him under the provisions of Section 2255, Title 28, United States Code.

On December 21, 1962, appellant filed the present motion to vacate the sentence or to correct it to a term of not more than fifteen years, on the ground that the plea of guilty was induced and entered through misrepresentation and as the result of an agreement between his attorney and the United States Attorney that if he would plead guilty the maximum sentence which would be imposed would not exceed fifteen years, and that he agreed to accept the proposal on this condition only. The motion alleges that his plea of guilty was void as a matter of law and that the conviction and sentence resting thereon is repugnant to the 5th, 6th and 14th Amendments to the United States Constitution, and asked for a hearing.

The motion states that appellant can substantiate his allegations by four named witnesses, namely: his codefendants Jalove and Brinegar, the United States Attorney, and his own attorney, and by two unnamed additional witnesses. Appellant did not file or tender a statement or affidavit of any of these six persons, setting out what said person would testify if called as a witness.

On December 31, 1962, the District Judge filed a Memorandum which stated that by the express provisions of Section 2255, Title 28, United States Code, the Court is not required to consider a second motion for similar relief under that section on behalf of the same prisoner and that in his opinion the present motion proceeds from grounds that were pressed on the earlier motion. On the same day an order was entered overruling the motion, from which the present appeal was taken.

Appellant contends that his motion raised a factual issue with respect to the alleged agreement between his attorney and the United States Attorney by reason of which he was illegally induced to enter the plea of guilty and that under the rulings in *United States* v. *Hayman*, 342 U.S. 205, *Machibroda* v. *United States*, 368 U.S. 487, *Teller* v. *United States*, 263 F (2) 871, C. A. 6th, and *Motley* v. *United States*, 230 F(2) 110, C. A. 5th, he was entitled to a hearing on this factual issue.

We are of the opinion that the judgment should be affirmed for the reason given by the District Judge. *Section 2255, Title 28, United States Code; Howard* v. *United States*, 199 F(2) 276, C. A. 8th. The issue presented to the Court by the present motion was previously considered by the District Judge and found by him to be "entirely without merit." No appeal was taken from that ruling. Although this is not legally res judicata, we find, under the circumstances of this case, no abuse of discretion on the part of the District Judge in declining to consider for the second time an issue previously considered and ruled upon by him. Section 2255 expressly relieves him of the requirement to do so. *Bent* v. *United States*, 308 F(2) 585, C. A. 8th, cert. denied, 373 U. S. 917, rehearing denied, 374 U. S. 818; *Dann* v. *United States*, 234 F(2) 219, C. A. 6th, cert. denied, 352 U. S. 899; *Malone* v. *United States*, 299 F(2) 254, 256, C. A. 6th, cert. denied, 371 U. S. 863; *Moore* v. *United States*, 278 F(2) 459, C. A. D. C.; *Daniels* v. *United States*, 258 F(2) 356, C. A. 9th; *Corcoran* v. *United States*, 231 F(2) 449, 451, 452, C. A. 7th; *Wells* v. *United*

States, 210 F(2) 112, C. A. 5th; *Birtch* v. *United States*, 173 F(2) 316, C. A. 4th, cert. denied, 337 U. S. 944.

In addition, we are of the opinion that the factual issue claimed by the appellant to exist in this case does not have the necessary substance to require the District Judge to hold a hearing. As was recognized by the Supreme Court in *Machibroda* v. *United States*, supra, 368 U. S. 487, 495-496, it does not automatically follow that a petitioner is entitled to a full hearing on a factual issue raised by his motion, no matter how vague, conclusory or palpably incredible his allegations may be, and that the statute does not strip the district courts of all discretion to exercise their common sense. In that case, petitioner's allegations were supported by a detailed affidavit giving specific information about when and where the alleged agreement was entered into and other material information relative thereto. The Court apparently gave considerable weight to these "specific and detailed factual assertions of the petitioner." (p. 496.) In the present case we do not have such specific and detailed allegations.

In considering this question it must be noticed that although appellant was sentenced on March 13, 1959, he did not file his first motion to vacate or reduce the sentence until October 15, 1962, some three and one-half years later. There is no explanation for this delay. Incidentally, this was some eight months after the opinion was handed down in the *Machibroda* case on February 19, 1962, in which the basis of the motion to vacate is substantially the same as the one alleged by appellant in the present case. No reason is suggested by appellant, and none appears to exist, why the United States Attorney would make such an agreement. Proof of appellant's guilt was apparently beyond question. The four defendants were arrested within a few hours after the robbery, and appellant had $2,170.00 of the stolen money on his person when caught. When the guilty plea was entered the appellant expressly acknowledged to the Court that it was voluntary and entered because he was guilty of the charge. See: *United States* v. *Davis*, 319 F(2) 482, C. A. 6th.

Appellant relies in part upon two witnesses whose names he does not even disclose, two codefendants, whose credibility is such as to give little, if any, weight to what they might say in favor of appellant's claim, and the two attorneys in the case, who, obviously, can not on the record before us be considered by the Court as witnesses favorable to the appellant. Not only are we not advised of what these witnesses would testify to specifically, but such allegations by the appellant would in the present state of the record be purely hearsay. In our opinion, the allegations of the motion are, in the language used in *Machibroda*, supra, vague, conclusory, or palpably incredible, and as such, do not raise a bona fide factual issue upon which a hearing must be held. *Johnson* v. *United States*, 239 F(2) 698, C. A. 6th, cert. denied, 354 U. S. 940; *O'Malley* v. *United States*, 285 F(2) 733, 735, C.A. 6th; *United States* v. *Thomas*, 291 F(2) 478, 480, C. A. 6th, and cases therein cited. See also: *United States* v. *Davis*, supra, 319 F(2) 482, C. A. 6th.

The judgment is affirmed.

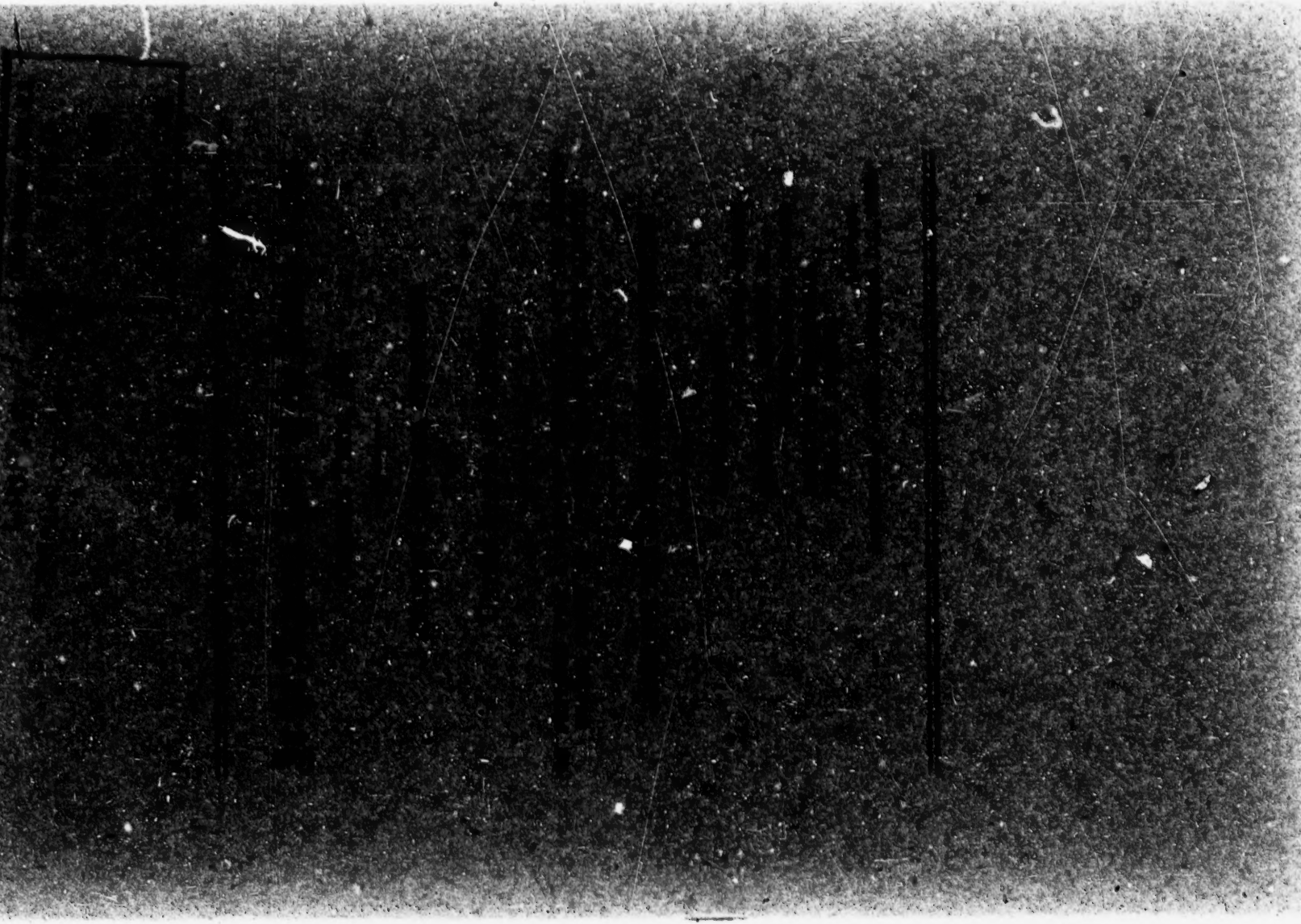
APPENDIX "B".

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

(Caption—No. 15304)

March 3, 1964

The petition for rehearing of the Appellant, Anthony Orlando, having been considered by the Court, it is ordered, that said petition for rehearing be denied.



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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 163

ANTHONY ORLANDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 327 F. 2d 185.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1964. A petition for rehearing was denied on March 3, 1964 (Pet. App. B). On June 1, 1964, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including June 8, 1964, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly denied summarily petitioner's motion to vacate sentence.

STATEMENT

1. In November 1958, petitioner and three codefendants—Jalove, Brinegar and Thornton—were charged in the United States District Court for the Eastern District of Kentucky with conspiracy and the substantive offense of aggravated bank robbery, in violation of 18 U.S.C. 371 and 2113 (App. 24a).[1] At arraignment before Judge Swinford on January 19, 1959, petitioner and Jalove, represented by the same retained counsel (see App. 11b), entered pleas of not guilty (App. 2b–7b). The court appointed counsel for the other two defendants and set the trial date for March 11, 1959.

On March 11, after the jury had been impaneled and sworn, Judge Swinford was advised that petitioner and Jalove desired to withdraw their pleas of not guilty and enter pleas of guilty. Petitioner personally assured the court that it was his wish to plead guilty to both counts of the indictment, and that he was doing this of his own free will (App. 9b–11b). The trial proceeded against Brinegar and Thornton.

On the following day, petitioner and Jalove filed motions to withdraw their pleas of guilty. Judge Swinford heard counsel on these motions on March 13, 1959, after the jury had retired to consider the case against Brinegar and Thornton (App. 14b). Counsel indicated that petitioner and Jalove had once again changed their positions and now pre-

[1] Record references are to the appendices to the briefs in the court of appeals—the small notation "a" following the page number referring to the Appellant's Appendix, and "b" to the Government's Appendix.

ferred to stand on their guilty pleas with respect to the substantive count since they "felt without any question," that they were guilty of the charge (App. 15b). He said that they felt, however, that a not guilty plea would be warranted as to the conspiracy count since they had not carefully thought out and planned the robbery in advance (App. 14b–15b). Petitioner and Jalove personally assured the court, in response to inquiry, that each desired to stand on the guilty plea to the substantive count (App. 15b). The court expressed some doubt as to whether the defendants understood the meaning of conspiracy, and a discussion on the subject followed among the court, government counsel and Jalove (App. 16b–18b). Jalove then admitted that he and petitioner had conspired "through ignorance." Petitioner and Jalove thereafter again entered a plea of guilty to both counts of the indictment, and counsel withdrew the motion to change the pleas of guilty (App. 18b–19b).

The jury returned a verdict of guilty as to Brinegar and Thornton, and the four defendants appeared before Judge Swinford for sentencing (App. 11b). Petitioner's counsel addressed the court and the court then asked petitioner if there was anything he wished to say (App. 12b). Petitioner answered, "No sir" (App. 13b).

The court observed that petitioner had the most serious criminal record of all the defendants (having been before a court on about thirty different occasions). It also noted that it was petitioner who, together with Jalove, had put in jeopardy the lives of persons in the bank, and it sentenced petitioner

to imprisonment for five years on the conspiracy count and twenty-five years on the substantive count, the terms to run concurrently (App. 13b).

2. On October 15, 1962, some $3\frac{1}{2}$ years after his conviction, petitioner filed a motion to vacate or correct the twenty-five year sentence and to have it reduced to fifteen years (Supp. App. 1a). The motion alleged that petitioner's plea of guilty was induced by his "court-appointed" counsel who informed him that the United States Attorney had guaranteed that his sentence would not exceed fifteen years, but that it would be thirty years if he did not plead guilty. The motion also alleged that the court failed to give petitioner an opportunity to speak before or after sentence, and that, if given the opportunity, petitioner "would truthfully have answered that he was pleading guilty in reliance upon his court-appointed attorney's representations" (Supp. App. 2a). Further allegations were made that petitioner was improperly denied (1) a continuance to employ other counsel, (2) a change of venue, and (3) a transcript of the record (Supp. App. 2a–3a). Petitioner requested a hearing "at which he may have witnesses called in his behalf" and that he be produced at the hearing to testify (Supp. App. 4a).

On October 25, 1962, Judge Swinford denied the motion, without a hearing, finding that the record, including the transcript of arraignment and sentence, clearly showed it to be "entirely without merit" (App. 5a). No appeal was taken from the denial.

3. On December 21, 1962, petitioner filed the present motion to vacate sentence (App. 7a). He alleged

that his sentence of twenty-five years should be reduced to fifteen years because his plea of guilty had been induced by misrepresentation and as a result of an agreement between his attorney and the United States Attorney (App. 8a, 11a). He explained that a "few months prior to trial", his counsel advised him that he had been able to make a deal with the United States Attorney that would effect a disposition of all petitioner's difficulties and that petitioner understood that if he would plead guilty the maximum sentence imposed would not exceed fifteen years (App. 11a-12a). He stated that he could substantiate his allegations by four named witnesses—the codefendants Juiove and Brinegar, his attorney, and the United States Attorney—and by two unnamed additional witnesses (App. 11a).

Judge Swinford overruled the motion on the ground that 28 U.S.C. 2255 did not require that he entertain a second successive motion for the same relief (App. 15a). The court of appeals affirmed (Pet. App. A).

ARGUMENT

Both courts below properly held that the district court was not required to entertain petitioner's motion under 28 U.S.C. 2255 presenting again an issue previously considered and ruled upon by the district court.

In *Sanders* v. *United States*, 373 U.S. 1, this Court held that "controlling weight" may be given to the denial of a prior application under 28 U.S.C. 2255 if (1) the same ground presented in the subsequent application was determined adversely to the applicant

on the earlier application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the second application. 373 U.S. at 15. This threefold test was met in the present case: (1) The basis for relief in the second application—the assertion that petitioner's plea was induced by the United States Attorney's promise of a light sentence—was essentially the same as that urged in the previous application. (2) The district court, on consideration of the first application, had determined that the files and records showed the claim to be entirely without merit, and no appeal was taken from this decision. (3) The records showed not only that petitioner had assured the court that he was entering his plea voluntarily, but that his contention that he would have disclosed the alleged agreement if he had been given an opportunity to speak was totally false. The records also showed that the attorney who allegedly relayed the promise of a light sentence was counsel of petitioner's own choosing, not "court-appointed" counsel. The circumstances of petitioner's plea, considered as a whole and in light of the demonstrated falsity of some of his allegations, certainly do not suggest that any injustice was perpetrated.

Nor, as the court of appeals observed, were petitioner's factual allegations substantial enough to require a hearing. In *Machibroda* v. *United States*, 368 U.S. 487, this Court expressly noted that a petitioner was not necessarily entitled to a full hearing on every factual issue regardless of "how vague, conclusory or palpably incredible his allegations may be."

368 U.S. at 495. In that case, which was thought to be "not far from the marginal * * * line," 368 U.S. at 496, the Court observed that petitioner's assertions were "detailed and specific" as to time, place and circumstances of the alleged promise (368 U.S. 489, 495, 496), and, while improbable, could not be termed incredible (368 U.S. 496). By contrast, petitioner's assertions in this case lack specificity and are incredible in light of this record. The record shows that petitioner thought of withdrawing his plea of guilty to the conspiracy count, a move which would have been completely meaningless if he believed that he had a guarantee of a fifteen-year sentence.[2] In addition, petitioner's allegation that witnesses could corroborate his story conflicts with his basic factual contention that a "deal" was privately made between his attorney and counsel for the government. Finally, petitioner's allegations were first made $3\frac{1}{2}$ years after sentence, a delay which would hardly have been tolerable if petitioner's version of the facts were at all truthful. As this Court noted in *Machibroda*, 368 U.S. at 495, the statute "does not strip the district courts of all discretion to exercise their common sense," and the district court's exercise of that discretion in this case eminently warranted its conclusion.

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[2] It is also improbable that the government, which was proceeding with trial against his co-defendants, would be eager to forego trial as to petitioner since he, the most seasoned of the four criminals, was one of those who entered the bank and upon whose person stolen money was found.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

JULY 1964.

No. 1[redacted]163

IN THE

Supreme Court of the United States

ANTHONY ORLANDO

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Reply Brief for Petitioner

IN THE

Supreme Court of the United States

October Term, 1963

No. 1198

ANTHONY ORLANDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Reply Brief For Petitioner

May it Please the Court:

In *Sanders v. United States*, 373 U.S. 1, 22, your Honors commended to the authorities concerned, the general advisability of "the imaginative handling of a prisoner's brief motion." The writer of the government's brief has apparently attempted to avail himself of the privilege of "imaginative handling" in quite a different context.

The government's brief in opposition does not answer the contentions made within our petition for certiorari. Rather, the brief in opposition is an evasion of the issues that we presented to your Honors.

The government contends that the denial of Petitioner's first motion in the District Court, was "on the merits." (Brief in Opposition, p. 6). That is apparently an attempt to show that your Honors' opinion in *Sanders v. United States*, 373 U.S. 1, does not control the case at bar.

We suppose that it is possible to contend that any determination is made "on the merits" in the sense that it represents an attempt to do what seems to be right. But if a decision on the merits means an attempt to find the intrinsic rights and wrongs of the relationship between Petitioner and the government, as determined by matters of substance rather than by matters of form, it is quite certain that neither of Petitioner's motions have been decided "on the merits".

In *Sanders*, your Honors held that a decision on the merits "means that if factual issues raised in the prior application, and it was not denied on the basis that the files and records conclusively resolved those issues an evidentiary hearing was held". 373 U.S. 16.

No evidentiary hearing was held. Petitioner swore that he had been promised a maximum sentence of fifteen years. The District Court looked only to "the record, including a transcript of the arraignment and sentence". (A. 3a). Sure enough, the records did not show that any such promise had been made. Therefore the motion was denied.

We are astounded that the government would feel free

From that auspicious beginning, the government proceeds to argue that the Petitioner is quite unreliable. The relevance of that assertion is unclear at best. Logicians would refer to such an argument as "well-poisoning". A lawyer must content himself with calling that presentation not merely irrelevant, but also totally unwarranted. The supposed indicia of Petitioner's unreliability cited by the government, may indeed demonstrate unreliability, but not on the part of the Petitioner.

The government contends that Petitioner's "attempt to avoid an adjudication of guilt on the conspiracy count" "would have been completely meaningless if he believed that he had a guarantee of a fifteen year sentence." Brief in Opposition, p. 7). But it would not have been the least bit meaningless if Petitioner had been considering as he probably was, the effect of this adjudication on his co-defendants and the fact that the conviction of an additional crime would necessarily affect his chances before the parole board.

The government also contends that Petitioner is unreliable because he claims that witnesses will support his story. That startling assertion is predicated on the government's contention that the existence of witnesses "contradicts" with Petitioner's supposed "basic factual contention that a deal was *precluded* made between his attorney and counsel for the government." (Emphasis added, Brief p. 7). We are reluctantly compelled to advise your Honors that the record will not support the government's assertion. Nowhere in the record does Petitioner refer to a "precluded" arrangement. There simply is no such imagined factual claim that claimed by the government.

Finally, the government contends that the delay of three and one-half years prior to Petitioner's first motion "would hardly have been tolerable if Petitioner's version of the facts were at all truthful." On the contrary: It was only after a delay of three and one-half years that the difference between a fifteen years sentence and a twenty-five year sentence began to have any real meaning to the petitioner. Prior to his first motion, Petitioner could not have been considered for parole whether his sentence had been fifteen years or twenty five. Moreover, there is no intimation that the Petitioner had the knowledge or the resources with which to present his motion during the 3½-year delay in which the government finds such sinister inferences. It is not unknown that the government has delayed action for longer periods of time and with less justification in circumstance.

* * *

The government can exhaust the lexicon of epithet in its characterizations of the Petitioner without affecting in any degree the merits of this case. All the language in the world has not the eloquence of the bald fact that Petitioner has formally alleged that if asked, his lawyer and the prosecutor who handled his case for the government will admit that Petitioner had a "deal" for a fifteen-year sentence—and nobody has been willing even to ask the prosecutor, or Petitioner's lawyer, or anyone else whether this is true. On these unconscionable facts, the government has seen fit to assert in this court that Petitioner's contention was decided "on the merits."

The situation is literally intolerable. We pray that your Honors will not deem it worthy of further tolerance.